In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1289

THE CALIFORNIA COMPANY,
A Division of Chevron Oil Company,
Petitioner,

vs.

FEDERAL POWER COMMISSION,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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The California Company, a Division of Chevron Oil Company, petitions for a writ of certiorari to review the judgment entered in this case on October 14, 1975, by the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. A) is reported at 520 F.2d 1061. The opinion of the court of

appeals denying certain petitions for rehearing (App. B) is reported at 525 F.2d 1261. The opinions and orders of the Federal Power Commission relevant to the questions here presented are No. 699 (App. C) reported at 51 F.P.C. (1974) 2212, and No. 699-H (App. D) not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on October 14, 1975 (App. A). Petitions for rehearing by certain parties were denied January 14, 1976 (App. B). On December 18, 1975, Mr. Justice Powell entered an order extending the time of petitioner, who was not a party to a petition for rehearing, to file a petition for a writ of certiorari to and including March 12, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act (15 U.S.C. 717r(b)).

QUESTION PRESENTED

In the Southern Louisiana Area, and in three other areas,[1] the Federal Power Commission fixed the amount of refunds payable by producers on sales which had occurred prior to August 1, 1971, but provided that such refunds could be worked off at the rate of one cent for each Mcf of new gas discovered and dedicated to the interstate market. The Commission's order was affirmed by the Fifth Circuit and by this Court and became final.[2] In subsequent proceedings in the instant case the Commission fixed, as just and reasonable, increased national

1. Texas Gulf Coast Area, Other Southwest Area and Permian Basin Area.

2. *Placid Oil Company v. Federal Power Commission* (5 Cir. 1973) 483 F.2d 880, affirmed *sub nom. Mobil Oil Corp. v. FPC* (1974) 417 U.S. 283.

rates for "new" gas (applicable to all areas) but held that producers who owed refunds could not receive this increased "new" gas rate unless they waived the "work-off" provisions of its prior order and paid the refunds in cash.

The question presented is whether the Commission's order constitutes retroactive rate-making contrary to the controlling decisions of this Court.

STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821-833, as amended, 15 U.S.C. 717-717w, are set out at Appendix E.

STATEMENT OF THE CASE

In July 1971 the Commission fixed rates for future deliveries of natural gas produced in the Southern Louisiana Area.[3] At the same time it fixed "rate levels for refund purposes"[4] for all past deliveries of gas and provided that the refunds calculated on the basis of these "rate levels" could be discharged by any company owing refunds by discovering and dedicating new gas reserves to the interstate market during a period ending October 1, 1977. For all such reserves the producer was allowed a credit of one cent per Mcf. Any portion of the refund obligation not so discharged was to be paid in cash with interest.[5]

This order was affirmed by the Court of Appeals for the Fifth Circuit (*Placid Oil Company v. Federal Power Commission* (1973) 483 F.2d 880) and by this Court (*Mobil Oil Corp. v. Federal Power Commission* (1974) 417 U.S. 283). In its opinion, this Court emphasized that the work-

3. *Southern Louisiana Area Rate Case (SoLa II)*, 46 F.P.C. 86, modified, 46 F.P.C. 633.

4. *Mobil Oil Corp. v. FPC* (1974) 417 U.S. 283, 300 fn. 19.

5. The Commission's order is summarized by this Court in its opinion in *Mobil Oil Corp. v. FPC* (1974) 417 U.S. 283, 299-300.

off provision of the Commission's order was an "integral part" of the 1961-1971 rate structure established for all past deliveries:

> "However, the proposed settlement stipulated a refund obligation of 150 million dollars, with a proviso that this could be worked off by the commitment by a refund obligor of additional gas reserves to the interstate market. The Commission adopted this proposal as an integral part of the 1961-1971 rate structure and established a schedule aggregating 150 million dollars of refunds from those that were owed but not yet paid by producers who had collected rates in excess of certain prescribed levels lower than the established flowing gas rates" (417 U.S. 299-300).

Similar refund orders were entered and became final in three other area rate cases.[6]

In the instant case the Commission abandoned the concept of area rate making and put into effect a national rate. It found that costs of production had increased to a range of from 47.82 cents to 51.46 cents per Mcf and fixed a national rate for "new" gas of 50 cents per Mcf, with provisions for certain automatic escalations.[7] At the same time the Commission held that any producer owing refunds under its prior orders could not collect the new rate

6. *Texas Gulf Coast Area Rate Case,* 45 F.P.C. 674; reversed and remanded, *PSC of New York v. FPC* (D.C.Cir. 1973) 487 F.2d 1043; vacated and remanded, *Shell Oil Co. v. PSC of New York* (1974) 417 U.S. 964; affirmed on remand (D.C.Cir. 1975) 516 F.2d 746.

Other Southwest Area Rate Case, 47 F P.C. 99; affirmed, *Shell Oil Co. v. FPC* (5 Cir. 1973) 484 F.2d 469; certiorari denied, *Mobil Oil Corp. v. FPC* (1974) 417 U.S. 973.

Permian Basin Area Rate Case II, 50 F.P.C. 490 (appeal withdrawn).

7. Opinion No. 699-H, App. D 36-37.

unless the producer waived his right to have the gas credited toward a discharge of his refund obligation.[8]

The Court of Appeals for the Fifth Circuit affirmed the Commission's order.[9]

REASONS FOR GRANTING THE WRIT

The Natural Gas Act provides, and this Court consistently has held, that the Commission has no authority to prescribe retroactive rate changes or to order reparations:

> "It is conceded that under the Act the Commission has no power to make reparation orders. And its power to fix rates admittedly is limited to those 'to be thereafter observed and in force.' § 5(a)" (*Power Comm'n v. Hope Gas Co.* (1944) 320 U.S. 591, 618).

Accord:

FPC v. Sunray DX Oil Co. (1968) 391 U.S. 9, 24;

Montana-Dakota Co. v. Pub. Serv. Co. (1951) 341 U.S. 246, 254.

And see:

Arizona Grocery v. Atchison Ry. (1932) 284 U.S. 370.

The Commission's order in the instant case is a clear instance of retroactive rate making. The question involved is an important one relating to the appropriate exercise of the rate making power of the Commission. The Commission and the court below decided the question in a manner clearly in conflict with the foregoing decisions of this Court, and in a manner inconsistent with the decision of this Court in *Mobil Oil Corp. v. Federal Power Commission* (1974) 417 U.S. 283.

In so many words the Commission's order provides that producers owing refunds on gas sold and delivered prior

8. Opinion 699, App. C 109-111; Opinion 699-H, App. D 63-66.

9. *Shell Oil Co. v. FPC* (*National Rate Cases for New Gas*) (5 Cir. 1975) 520 F.2d 1061, rehearings denied 525 F.2d 1261.

to August 1, 1971, payable by a "work-off" provision under a rate order affirmed by this Court and long since final, cannot collect rates for "new" gas now found to be just and reasonable unless their refund obligation is retroactively changed to one payable in cash with interest.

The economic coercion is manifest: The choice is to sell gas at a maximum of 27 cents per Mcf (the highest rate for new gas fixed in the Commission's previous order) plus a one cent credit on refunds, or to charge the just and reasonable rate of 50 cents—a choice which is no choice at all. The effect of the order is simply to delete the "work-off" provision from the old rate structure which was affirmed by this Court in the *Mobil* case, contrary to the settled rule that the Commission has no power to do indirectly what it cannot do directly (*Central West Utility Co. v. Federal Power Commission* (3 Cir. 1957) 247 F.2d 306).

It is no answer to say that the Commission does not, in so many words, order a change in the old refund rate structure and retroactively direct additional amounts to be paid as reparations. Though phrased as an option, the effect is the same as a direct order. The Commission, having found that the cost of production of gas had increased to a range of from 47.82 cents to 51.46 cents per Mcf, determined that a just and reasonable rate for new gas is 50 cents per Mcf, with certain escalations. It put that rate into effect. At the same time, however, it ordered that producers owing refunds could not charge that rate unless they "voluntarily" consented to a revision of the earlier rate structure under which refunds were payable. The effect of the order is to deny producers the right provided in the Commission's earlier order to "work-off" their refund obligations and to require them to pay all of their undischarged obligations in cash with interest.[10]

The situation is no different than if the Commission had fixed the just and reasonable rate for all future gas deliveries and then held that, on reconsideration, it believed it had fixed refunds in its previous order for gas sold prior to 1971 at too low a rate; that, therefore, producers owing refunds on past sales could not charge the just and reasonable rate on future sales until they had paid $150 million more in refunds than the Commission had previously ordered.

The court below really gave no consideration to this point. Treating the matter briefly under a single subheading, "Refund, Work-off and Contingent Escalation Provisions," the court confused the refund "work-off" provisions in the prior rate orders with the provisions in those orders relating to contingent escalations in the price of gas to be sold in the future. In its earlier orders the Commission fixed a rate structure including refunds *with respect to past sales*. At the same time it fixed rates *for the future* which included escalations in price if the industry found and dedicated to the interstate market new gas reserves.[11] Both provisions operated as incentives to discover and dedicate much needed gas. However, contrary to the assumption of the court below, the provisions are subject to entirely different legal principles. The court below said (App. A p. 42):

> "In Opinion Nos. 699 and 699-H the FPC provided that natural gas sold at the new national rate could

10. The amount of interest alone, quite apart from the approximately $175 million refund obligation involved in the four areas, is manifestly a substantial retroactive addition to the refund liability.

11. See *Mobil Oil Corp. v. FPC* (1974) 417 U.S. 283, 298-300.

> not be used to discharge refund obligations or to trigger contingent escalations. Producers argue before this Court that this constitutes an improper retroactive modification of prior rate opinions. We disagree. By its orders which are here at issue, the FPC has established a new rate system for gas dedicated to interstate commerce after January 1, 1973, in addition to gas from certain other sources. The new national rate is the product of an independent determination of incentives, and, as it is in so many other regards, the new rate structure is not tied to previous determinations. Replacing one incentive structure with another or, viewed in another light, providing a new alternative rate system, is an exercise of Commission discretion which does not amount to retroactive rate regulation."

The court is correct in saying that "replacing one incentive with another" or "providing a new alternative rate system" is not retroactive rate regulation insofar as the new rates replace the contingent rate escalations in the old orders fixing prices *for future sales*. But no "new alternative rate system" can retroactively affect refund provisions which, as this Court pointed out in its *Mobil* decision (supra, p. 4), were an "integral part of the 1961-1971 rate structure" for gas sold prior to August 1, 1971. As this Court said in *Arizona Grocery v. Atchison Ry.* (1932) 284 U.S. 370, 389, speaking of the comparable powers of the Interstate Commerce Commission:

> "It could repeal the order as it affected future action, and substitute a new rule of conduct as often as occasion might require, but this was obviously the limit of its power, as of that of the legislature itself."

CONCLUSION

The court below has decided an important question of Federal law, relating to the rate making powers of the Federal Power Commission, in a way in conflict with applicable decisions of this Court. The petition for a writ of certiorari should be granted.

Dated: March 11, 1976.

Respectfully submitted,

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